IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1428

KIRBY J. HENSLEY,

Petitioner,

—vs.—

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out at App. 29a. The District Court's order denying reconsideration, but granting a certificate of probable cause is unreported and is set forth at App. 30a.

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F. 2d 1252, and is set out at App. 32a-34a. The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth at App. 35a.

Jurisdiction

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. The petition for writ of certiorari was filed on May 2, 1972, and was granted on October 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §2241(c)(3).

Question Presented for Review

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment provides, in pertinent part:

"... nor shall any state deprive any person of life, liberty, or property, without due process of law, ..."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution ... of the United States;"

28 U.S.C. §2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

California Penal Code §§1318-1319.6 (West, 1968), provide as follows:

§1318.4

To be released on his own recognizance the defendant shall file with the clerk of the court in which the magistrate or judge is presiding an agreement in writing duly executed by him, in which he agrees that:

(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.

(b) If he fails to appear and is apprehended outside of the State of California, he waives extradition.

(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance as elsewhere provided in this chapter.

§1318.6

After a defendant has been released pursuant to this article, the court in which the charge is pending may, in

its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security.

§1318.8

The court to which the committing magistrate returns the depositions, or in which an indictment, information or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of any defendant who has been released upon his own recognizance and his commitment to the officer to whose custody he was committed at the time of such release, and his detention until legally discharged, in the following cases:

(a) When he has failed to appear as agreed.

(b) When he was required to give bail or other security as provided in Section 1318.6 and has failed to do so.

(c) Upon an indictment being found or information filed in cases provided in Section 985.

§1319.6

Every person who is charged with the commission of a misdemeanor who is released on his own recognizance pursuant to this article who wilfully fails to appear as he has agreed, is guilty of a misdemeanor.

Statement

Petitioner, Kirby J. Hensley, convicted of a misdemeanor in the state court,[1] and presently enlarged on his own recognizance,[2] filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, challenging the constitutionality of the state conviction.[3]

The District Court did not reach any substantive issues, but denied the petition on the ground that petitioner, being enlarged on his own recognizance, was not "in custody" for purposes of 28 U.S.C. §2241(c)(3).

The Court of Appeals affirmed, relying upon its previous dictum, in *Matysek* v. *United States*, 339 F.2d 389 (9th Cir. 1964), to the effect that a person released on bail was not

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[1] Hensley was sentenced to one year in jail plus $625 fine and penalty assessment for violation of California Education Code §29007, which prohibits the award of Doctor of Divinity degrees without requisite accreditation.

[2] Hensley has been enlarged on recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30-day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the Court's action on a timely filed petition for a writ of certiorari, to remain in effect pending the judgment of this Court.

[3] The grounds for this Constitutional challenge are, briefly, as follows: 1) denial of free exercise of religion, by the imposition of punishment for essentially religious activity in awarding honorary Doctor of Divinity certificates to individuals who complete a course of religious instruction, and 2) denial of due process of law and effective assistance of counsel, by the failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the trial court re-opened the case after having initially stayed the proceedings to determine if it had jurisdiction, and by the imposition of judgment of conviction in absentia.

"in custody", actual or constructive, so as to satisfy 28 U.S.C. §2241. The Court of Appeals specifically noted, however, that "the decisional rule is different in several other circuits" and that "the Supreme Court has not, to this date, considered the express question posed herein."

On October 10, 1972, this Court granted Hensley's petition for writ of certiorari.

ARGUMENT

State Prisoners Released On Bail Or Recognizance Pending Appeal Are "In Custody" for Purposes of the Federal Habeas Corpus Statute.

A. The Restraints Imposed Upon a Person Sentenced To Imprisonment, Who Is Released On Bail Or Recognizance Pending Appeal, Fits the Term "In Custody" in the Federal Habeas Corpus Statute.

In California, as in most States, a person sentenced to imprisonment, who is released on bail or recognizance pending appeal, is subject to a number of restraints, which significantly differentiate his status from that of a free person. The defendant is obligated to appear in court at all times required, and in default thereof, waives extradition. The order of release may be revoked at any time, and the defendant can be rearrested. Failure to appear constitutes a separate offense.[4] In some jurisdictions, territorial and supervisory restrictions are also imposed. Cf. 18 U.S.C. §3146. "When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers." *Carlson* v. *Landon*, 342 U.S. 524, 547 (1952).

In addition, "the fact that petitioner was forced to seek a federal stay order to fend off state incarceration is itself

[4] Cal. Pen. Code §§1318.4, 1318.6, 1318.8, 1319.6, *infra*, at 3-4.

a significant restraint 'not shared by the public generally'." *Choung* v. *People of State of California*, 320 F. Supp. 625, 628 (E.D. Cal. 1970), rev'd, 456 F.2d 176 (9th Cir. 1972), pet. for cert. filed, 71-1562, 40 U.S. L. Week 3577, 41 U.S. L. Week 3028 (May 30, 1972).

This court has definitively set to rest the notion of federal habeas corpus as "a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963) (person on parole is "in custody" for federal habeas corpus purposes).

Subsequent Supreme Court decisions have given an appropriate interpretation to the scope of the "Great Writ." [5]

Of particular relevance hereto, *Peyton* v. *Rowe*, 391 U.S. 54 (1968), applied the federal habeas corpus remedy to

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[5] *Walker* v. *Wainwright*, 390 U.S. 335 (1968), permitted a prisoner to attack a sentence which he was currently serving even though another valid sentence awaited him.

Carafas v. *LaVallee*, 391 U.S. 234 (1968), held that expiration of a petitioner's sentence, before his habeas corpus application was finally adjudicated, did not terminate federal jurisdiction:

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that [t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new §2244(b) (1964 ed., Supp. II) speaks in terms of 'release from custody or other remedy'."

Harris v. *Nelson*, 394 U.S. 286, 291 (1969) emphasized:

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

questions of future release, overruling *McNally* v. *Hill*, 293 U.S. 131 (1934):

> "to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings." 391 U.S., at 73
>
> "Rowe and Thacker may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men." Ibid., at 64.

Most recently, *Strait* v. *Laird*, 406 U.S. 341 (1972), upheld the right of an unattached, inactive, Army reserve officer to bring a habeas corpus proceeding—seeking discharge as a conscientious objector—at the place of his domicile, even though he was under nominal command of the Reserve located in Indiana. Mr. Justice Rehnquist, in dissent, suggested, in part, that custody, for habeas purposes, "does not exist for an unattached reservist who is under virtually no restraints upon where he may live, work, or study, and whose only connection with the Army is a future obligation to enter active duty." 406 U.S., at 350. But, of course, petitioner Hensley hardly is that free, and the decision in *Strait* applies a fortiori.

These relatively recent cases[6] vindicate the conclusion, reached by several lower federal courts,[7] as well as by the

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[6] The older decisions in *Stallings* v. *Splain*, 253 U.S. 339 (1920); *Johnson* v. *Hoy*, 227 U.S. 245 (1913); *Baker* v. *Grice*, 169 U.S. 284 (1898); and *Wales* v. *Whitney*, 114 U.S. 564 (1885), obviously are no longer vital.

[7] See *Marden* v. *Purdy*, 409 F. 2d 784, 785 (5th Cir. 1969); *Cupler* v. *City of Greenville*, 422 F. 2d 299, 301 (5th Cir. 1970);

California Supreme Court,[1] that a person on bail or recognisance is "in custody" sufficient to seek habeas corpus relief. This result is fully consistent with the purposes of the federal habeas corpus statute.

B. The Purposes of the Federal Habeas Corpus Statute Would Be Frustrated by a Requirement That a Criminal Defendant Who Is Released On Bail Or Recognizance Pending Appeal, Must First Surrender To Imprisonment.

A requirement that a state criminal defendant, who is released on bail or recognizance pending appeal, must first surrender to imprisonment, before he may file a petition for writ of habeas corpus, would operate effectively to dilute and undermine Fourteenth Amendment rights.

Beck v. *Winters*, 407 F. 2d 125, 126-27 (8th Cir. 1969); *Ouletta* v. *Sarver*, 307 F. Supp. 1099, 1101 n. 1 (E.D. Ark. 1970), aff'd, 428 F. 2d 804 (8th Cir. 1970); *Burris* v. *Ryan*, 397 F. 2d 553, 555 (7th Cir. 1968); *United States ex rel. Smith* v. *Di Bella*, 314 F. Supp. 446, 448 (D. Conn. 1970); *Duncombe* v. *New York*, 267 F. Supp. 103, 109 n. 9 (S.D.N.Y. 1967); *Matzner* v. *Davenport*, 288 F. Supp. 636, 638 n. 1 (D. N.J. 1968), aff'd 410 F. 2d 1376 (3rd Cir. 1969). Contra, *Allen* v. *United States*, 349 F. 2d 362 (1st Cir. 1965); *United States ex rel. Meyer* v. *Weil*, 458 F. 2d 1068 (7th Cir. 1972), pet. for cert. filed, 72-5175 (Aug. 2, 1972); *Moss* v. *State of Maryland*, 272 F. Supp. 371 (D. Md. 1967); *United States ex rel. Granello* v. *Krueger*, 306 F. Supp. 1046 (S.D.N.Y. 1969).

[1] In the case of *In Re Smiley*, 66 Cal. 2d 606, 613, 58 Cal. Rptr. 579, 583, 427 P. 2d 179, 183 (1967), the California Supreme Court stated:

> "It cannot be argued that release on recognizance lacks meaningful sanctions. The statute requires the defendant to file an agreement in writing promising to appear at all times and places ordered and waiving extradition if he fails to do so outside California (Pen. Code, §1318.4), and makes wilful failure to appear punishable as an independent crime (Pen. Code §1319.4, 1319.6). Such an individual is not free to go where he will, but is subject to restraints not shared by the public generally. (*Jones* v. *Cunningham*, 371 U.S. at p. 240, 83 S. Ct. at p. 376, 9 L. Ed. 2d 285.) He is therefore under sufficient constructive custody to permit him to invoke the writ."

Where, as here, substantial constitutional questions arising under the First and Fourteenth Amendments are presented, each day the person is incarcerated constitutes an irreparable injury. For that reason, this Court, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), recognized the propriety of permitting habeas corpus to be brought in anticipation of service of the challenged conviction.

> "Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time." Ibid. 391 U.S. at 64

While it may be theoretically possible for a defendant to surrender to imprisonment and then quickly file a petition for writ of habeas corpus and an application for a stay or bail pending hearing therein, *In Re Shuttlesworth*, 369 U.S. 35 (1962), such matters entail discretion and delay, and create an avoidable emergency imposition upon a District Judge's time. A lower court asked to act in haste, may understandably decline to grant a stay initially, at least until the substantiality of the constitutional questions presented is clearly demonstrated. By that time, however, the sentence may already be served if it is short.

Under *Younger* v. *Harris*, 401 U.S. 37 (1971), a person charged with violating an unconstitutional state law[9] would not be able to obtain an injunction to forestall state court prosecution, absent a showing of "bad faith" enforcement. After conviction, the defendant might decide, for a variety of reasons, not to seek review in the Supreme Court after exhausting his state court remedies, or if he did file a petition for writ of certiorari, this court might decline to review. At that point, the defendant could look only toward the United States District Court, in habeas corpus, for

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[9] See, e.g., *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

appropriate relief. If he had to surrender to imprisonment first, only under the most extraordinary circumstances would he be able to be spared the ordeal of being incarcerated for at least some time, in an often decrepit penal institution.[19]

This Court's sensitivity to the significance of penal incarceration, e.g., *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Tate* v. *Short*, 401 U.S. 395 (1971); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Peyton* v. *Rowe*, 391 U.S. 54 (1968), points up the appropriateness of permitting a defendant on bail or recognizance to seek federal habeas corpus relief, provided that he has exhausted available state court remedies. Requiring the defendant first to surrender might involve physical and psychological dangers, delay in protecting constitutional rights, and unnecessary burdens upon the District Courts, all without any corresponding benefit to the administration of justice.

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[19] For a description of local jails, see, *Jones* v. *Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd sub nom. *Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972); *Hamilton* v. *Love*, 328 F. Supp. 1182 (E.D. Ark. 1971); Mattick & Aikman, *The Cloacal Region of American Corrections*, 381 Annals of Amer. Acad. Pol. & Soc. 109 (1969); 1970 National Jail Census (L.E.A.A.); McGee, *The Administration of Justice: The Correctional Process*, 5 NPPAJ 225 (1959) (describing the typical county jail as "the lowest form of social institution on the American scene.") Prisoners are frequently subjected, from the instant that they enter the jail, to unsanitary conditions, inadequate shelter, lack of proper food, heat, light, and recreational opportunities, assaults by fellow prisoners, and other degrading and dehumanizing circumstances; thus, incarceration for even the shortest period of time can involve serious physical, not to mention psychological, dangers. See, e.g., *Wayne County Jail Inmates* v. *Wayne County Board of Commissioners*, No. 173-217 (Cir. Ct. Wayne Cty. Mich. May 18, 1971) (3-judge court) (reprinted at p. 119 of Hearings Before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 92nd Congress, 2d Session, ON CORRECTIONS, Part VIII (March 31, 1972).) Interestingly, a federal court in the very district in which petitioner Hensley would be forced to surrender, has condemned the local jail for its barbaric conditions. *Brenneman* v. *Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).

CONCLUSION

The plain meaning of the statutory term "in custody" covers the situation of a person released on bail or recognizance, and the purposes of federal habeas corpus, in safeguarding federal constitutional rights, are served by that interpretation. In the face of this, anachronistic conceptual notions ought not prevail. The judgment of the court below should, therefore, be reversed and the case remanded for further proceedings.

Respectfully submitted,

November, 1972

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